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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH

MERRICK BANK CORPORATION, a Utah corporation, Plaintiff, Counterclaim-Defendant and Third Party Plaintiff , vs. ELECTRONIC PAYMENT SYSTEMS, LLC, a Colorado limited liability company, Defendant and Counterclaim-Plaintiff, vs. TSYS ACQUIRING SOLUTIONS, LLC, Third Party Defendant.	**THIRD PARTY COMPLAINT OF MERRICK BANK CORPORATION** Case No.: 2:14-cv-00362 Judge: Robert J. Shelby Magistrate Judge: Paul M. Warner

Plaintiff, counterclaim-defendant and third party plaintiff Merrick Bank Corporation ("**Merrick**"), by and through its counsel of record, as its third party complaint against TSYS Acquiring Solutions, LLC (together, "**TSYS**"), hereby alleges, avers and prays as follows:

PARTIES

1. Merrick is a Utah corporation with its principal place of business in Utah.

2. Upon information and belief, defendant and counterclaim plaintiff Electronic Payment Systems, LLC (**"EPS")** is a Colorado limited liability company with its principal place of business in Englewood, Colorado.

3. Upon information and belief, third party defendant TSYS is a Delaware limited liability company with its principal place of business in Tempe, Arizona.

JURISDICTION & VENUE

4. The Court has supplemental jurisdiction over this third party complaint pursuant to 28 U.S.C. § 1367.

5. Venue is proper in the United States District Court for the District of Utah pursuant to 28 U.S.C. § 1391(b)(2).

BACKGROUND

6. EPS has alleged as its Second Counterclaim against Merrick that Merrick failed to pay EPS the amounts due to EPS each month from August 2004 until the parties terminated their relationship in January 2014.

7. The Independent Sales Organization Agreement (the "ISO Agreement"), as amended, between EPS and Merrick, provided for Merrick to establish a clearing account to settle credit card transactions for approved EPS merchants. The agreement required Merrick to debit merchants' settlement accounts each month for the amount of merchant fees "in accordance with the periodic information supplied by [EPS] or [by the] third party processor"

authorized by EPS to process merchant transactions. The ISO Agreement further provided that Merrick would credit EPS's account with the monies collected for EPS's fees and other charges for the prior month "within three business of receipt of reporting from the [third party] processor verifying Merchant fees and charges."

8. TSYS was the third party processor authorized by EPS to process merchant transactions. TSYS (formerly VITAL Processing Services, LLC) entered into a Processing Services Agreement with EPS in August 2005 (the "TSYS-EPS Processing Services Agreement"). The TSYS-EPS Processing Services Agreement provided for EPS to utilize the Merchant Services that TSYS provided to Merrick pursuant to the existing Processing Services Agreement between TSYS and Merrick, which was originally dated August 1, 2004, and was amended at various times and superseded and replaced on July 31, 2012 (the "TSYS-Merrick Processing Services Agreement"). Under these agreements, the Merchant Services provided by TSYS to EPS and Merrick included, among other things, merchant authorization, accounting and clearing services.

9. Pursuant to the TSYS-Merrick Processing Services Agreement, TSYS agreed to indemnify Merrick and hold it harmless for any claims arising from or in connection with TSYS's material breach of the agreement.

10. Merrick and TSYS also entered into a Clearing Bank Agreement, dated August 31, 2010. The Clearing Bank Agreement providing for Merrick to act as a clearing bank for the merchant accounts of ISOs, which included EPS, that had entered into separate processing agreements with TSYS. The Clearing Bank Agreement provided that TSYS was taking directions in connection with TSYS's data processing services from the respective ISOs and not from Merrick. The Clearing Bank Agreement required TSYS to provide Merrick with

transaction data and reporting necessary for Merrick to properly clear and settle transactions and accurately settle fees to ISOs.

11. Under the Clearing Bank Agreement, TSYS agreed to indemnify Merrick and hold it harmless for any liability arising out of the agreement to the extent such liability is caused by, relates to or arises out of a breach by TSYS of any of its duties or obligations under the agreement.

12. Each month, TSYS provided EPS and Merrick with information about the amount of merchant fees and charges to be debited from the merchants' accounts and credited to EPS. Merrick relied upon this information in deducting fees from merchant accounts and crediting amounts to EPS.

13. Merrick disputes that the amounts credited to EPS for any month were incorrect. Further, to the extent that any amounts were incorrect, Merrick has no liability to EPS because the terms of the ISO Agreement expressly required and permitted Merrick to rely on the information that was provided by EPS's approved processor, TSYS. If and to the extent, however, the amounts credited to EPS were incorrect and Merrick is found to have liability to EPS, then TSYS is obligated to indemnify Merrick and hold it harmless from such liability because it arises from and relates to TSYS's breach of and failure to adequately perform its duties and obligations under the TSYS-Merrick Processing Services Agreement and the Clearing Bank Agreement.

COUNT ONE
CONTRACTUAL INDEMNIFICATION -
TSYS MERRICK PROCESSING AGREEMENT

14. The preceding paragraphs are incorporated herein as if fully restated below.

15. Under the TSYS-Merrick Processing Services Agreement, TSYS agreed to indemnify Merrick and hold it harmless for any claims arising from or in connections with TSYS's material breach of the agreement.

16. In performing its obligations under the TSYS-Merrick Processing Services Agreement, TSYS provided Merrick each month with information about the amount of merchant fees and charges to be remitted to EPS. Merrick relied on that information in accordance with Merrick's ISO Agreement with EPS.

17. In its Second Counterclaim, EPS alleges that Merrick failed to remit the correct amounts due to EPS each month since August 2004 until January 2014.

18. Merrick denies EPS's claim. To the extent that Merrick is found liable to EPS, however, TSYS is required to indemnify Merrick for the full amount of such liability because it arises from and/or is in connection with TSYS's breach of and failure to adequately perform its obligations under the TSYS-Merrick Processing Services Agreement.

COUNT TWO
CONTRACTUAL INDEMNIFICATION
CLEARING BANK AGREEMENT

19. The preceding paragraphs are incorporated herein as if fully restated below.

20. Under the Clearing Bank Agreement, TSYS agreed to indemnify Merrick and hold it harmless for any liability arising out of the agreement to the extent such liability is caused by, relates to or arises out of a breach by TSYS of any of its duties or obligations under the agreement.

21. In performing its obligations under the Clearing Bank Agreement, TSYS provided Merrick each month with information about the amount of merchant fees and charges to be

remitted to EPS. Merrick relied on that information in accordance with Merrick's ISO Agreement with EPS.

22. In its Second Counterclaim, EPS alleges that Merrick failed to remit the correct amounts due to EPS each month since August 2004 until January 2014.

23. Merrick denies EPS's claim. To the extent that Merrick is found liable to EPS, however, TSYS is required to indemnify Merrick for the full amount of such liability because it was caused by, relates to and/or arises from TSYS's breach of its duties and/or obligations under the Clearing Bank Agreement.

COUNT THREE
COMMON LAW INDEMNIFICATION

24. The preceding paragraphs are incorporated herein as if fully restated below.

25. At all relevant times, TSYS acted as EPS's authorized processor for merchant transactions. In performing its obligations, TSYS provided EPS and Merrick each month with information about the amount of merchant fees and charges to be remitted to EPS. Merrick relied on that information in accordance with Merrick's ISO Agreement with EPS.

26. In its Second Counterclaim, EPS alleges that Merrick failed to remit the correct amounts due to EPS each month since August 2004 until January 2014.

27. Merrick denies EPS's claim. To the extent that Merrick is found liable to EPS, however, then as a matter of equity Merrick is entitled to indemnification from TSYS for the full amount of such liability because it was caused by TSYS's failure to adequately perform its obligations as processor.

WHEREFORE, in the event that Merrick is found to have any liability to EPS on its Second Counterclaim, Merrick prays that this Court issue an Order granting judgment to Merrick against third party defendant TSYS for the full amount of said liability, plus reasonable costs and attorney's fees, and such other and further relief as may be just and proper.

DATED this 29th day of December, 2016

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